

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Cumberland, Kentucky; Weber City,)
Glade Spring, and Marion, Virginia)
)

MB Docket No. 06-295

RM-11280

FILED/ACCEPTED

OCT - 9 2007

To: Office of the Secretary
Attn: Assistant Chief, Audio Division,
Media Bureau

Federal Communications Commission
Office of the Secretary

RESPONSE TO SECOND SUPPLEMENT

ASRadio, LLC ("ASRadio"), permittee of FM station WFYE(FM), Glade Spring, Virginia, hereby submits these comments in response to the Petition for Reconsideration, as supplemented, filed by JBL Broadcasting, Inc. ("JBL") in the above captioned proceeding.

Introduction

On May 26, 2006, the Commission granted ASRadio's construction permit for WFYE(FM), which will provide first local service to Glade Spring. Meanwhile, in a separate proceeding, JBL sought to upgrade WVEK-FM to a Class C3 station. The upgrade proposal also would change the allotments for WFYE(FM), WOLD-FM, and WVEK-FM as follows:

<u>Station</u>	<u>Present</u>	<u>Proposed</u>
WFYE(FM)	274A, Glade Spring, VA	263A, Glade Spring, VA
WOLD-FM	263A, Marion, VA	273A, Marion, VA
WVEK-FM	274A, Cumberland, KY	274C3, Weber City, VA

The Commission denied JBL's Petition for Rulemaking because the proposed allotment for WOLD-FM would be short spaced to two pending applications for new FM construction permits.

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JBL sought reconsideration, and in its two supplements, JBL advised the Commission that the applicants for the two pending applications have amended their applications to eliminate the short spacing.

I. If the Commission Cannot Grant the Implementing Construction Permit Application for WFYE(FM) Because It Would Displace an LPFM, the Commission Should Not Grant the Petition for Reconsideration.

ASRadio does not object to grant of the Petition for Reconsideration, so long as ASRadio can receive prompt authority to proceed with construction of its new station at Glade Spring. The Commission should not grant reconsideration, however, if the Media Bureau anticipates that it will not be able to grant the implementing construction permit application for WFYE(FM). ASRadio has learned that the Media Bureau at present will not grant construction permit applications that displace low power FM stations. The Petition for Reconsideration contemplates that ASRadio would file such a construction permit application for WFYE(FM). In particular, WFYE(FM) would operate on Channel 263A. Depending on the particulars of the Media Bureau's new internal practices regarding LPFM, WFYE(FM)'s operations on Channel 263A arguably could be deemed to have an adverse effect on low power FM station WKJV-LP, Bristol, Virginia. ASRadio tentatively has concluded, however, that at least seven other frequencies are available for WKJV-LP at its current transmitter location: 103.3 MHz, 103.5 MHz, 103.7 MHz, 104.1 MHz, 106.5 MHz, 107.7 MHz, and 107.9 MHz.¹ Given that several alternative frequencies are available for WKJV-LP, ASRadio believes that the Bureau should process an implementing construction permit application for WFYE(FM) quickly.

¹ If the Media Bureau's internal policy effectively requires that ASRadio reimburse the licensee of WKJV-LP for any expenses related to changing its frequency to permit prompt grant of any necessary application to implement the channel change, ASRadio expects that JBL will pay these expenses.

If, however, the Media Bureau anticipates that the presence of WKJV-LP would prevent it from granting an application for WFYE(FM) on Channel 263, ASRadio submits that the Media Bureau not grant JBL's Petition for Reconsideration. ASRadio submits that it would be arbitrary and capricious for the Media Bureau to assign Channel 263A to ASRadio when it knows in advance that it will not grant a construction permit on this channel. The uncertainty created by this proceeding has already delayed ASRadio's plans to bring new service to Glade Spring, Virginia. The Commission should not further delay new FM service by forcing WFYE(FM) to file an application that will remain pending indefinitely.

II. ASRadio Supports the Petition for Reconsideration if the Commission Can Grant Its Implementing Construction Permit Application for WFYE(FM).

If the Bureau determines that it can grant a construction permit application for WFYE(FM) on Channel 263A, the Commission should accept JBL's supplements² and grant the Petition for Reconsideration promptly, so the public may benefit from JBL's proposal.

Even if the Commission does not accept the supplements, the Commission should grant the Petition for Reconsideration because the short-spaced allotment for WOLD-FM fully complies with the Commission's policies. Under well-settled allotment policy, the Commission will permit a short-spaced allotment if (1) no technical change is proposed, (2) no new short spacing would be created, and (3) no existing short spacing is exacerbated.³ The WOLD-FM short spacing meets these requirements. JBL does not propose any technical changes for WOLD-FM. The station will continue to operate as it has for the last seventeen years.

² See *Alva, Mooreland, et al., Memorandum Opinion & Order*, 17 FCC Rcd 14722, ¶ 4 (MMB 2002) (accepting a supplement to an application for review advising the Commission of changed circumstances.). In *Alva*, the FCC noted that if it ignored the supplements, the petitioner likely would refile its petition for rulemaking and force the Bureau to waste resources reprocessing it. See *id.*

³ See, e.g., *Killeen and Cedar Park, Texas, Report & Order*, 15 FCC Rcd 1945, ¶ 11 (MMB 2000); *Oceanside and Encinitas, California, Report & Order*, 14 FCC Rcd 15,302, ¶ 6 (MMB 1999); *Newnan and Peachtree City, Georgia, Report & Order*, 7 FCC Rcd 6307, ¶ 5 (MMB 1992).

The Commission developed this exception to its short-spacing rules in a series of allotment decisions. In *Newnan, Georgia*, the Commission permitted a grandfathered short-spaced station to change its community of license without demonstrating a fully spaced allotment site.⁴ This served the public interest because the petitioner did not propose any change to the station's technical facilities, and as such, the potential for interference would not increase.⁵ The Commission expanded its *Newnan, Georgia* precedent in *Killeen, Texas* when it approved a short-spaced allotment where, as here, the Commission authorized the short spacing under its contour protection rules.⁶ The Commission reasoned that the test first enunciated in *Newnan, Georgia* applies equally whether the short-spacing arises due to grandfathering or contour protection.⁷ As a result, in *Killeen, Texas* the Commission again approved a short-spaced allotment because the petitioner did not propose any technical changes.⁸

JBL's proposal for WOLD-FM presents the Commission with almost identical circumstances as *Killeen, Texas*. JBL's proposal would not result in any physical changes for WOLD-FM. In 2002, the Commission allotted Channel 263A for WOLD-FM,⁹ but WOLD-FM does not operate and has never operated on Channel 263A. Instead, the station continues to operate on Channel 273A with the same facilities since 1990.¹⁰ In 1997 – five years before the Commission issued the *Report & Order* in *Cumberland, Kentucky* – two applicants filed for construction permits specifying facilities that were short spaced to WOLD-FM but complied

⁴ *Newnan, Georgia*, 7 FCC Rcd at ¶ 5.

⁵ *See id.*

⁶ *See Killeen, Texas*, 15 FCC Rcd at ¶ 11.

⁷ *See id.*

⁸ *See id.*

⁹ *Cumberland, KY; Weber City, VA, et al., Report & Order*, 17 FCC Rcd 5024 (MMB 2002).

¹⁰ *See* FCC File No. BLH-19901214KF

with the Commission's contour protection rule. JBL's proposal simply preserves the status quo. As in *Killeen, Texas*, (1) JBL proposes to create a short-spaced allotment, (2) the short-spacing arose because other FM stations filed construction permit applications seeking contour protection with respect to WOLD-FM, and (3) JBL does not propose any technical changes for WOLD-FM. Consequently, under *Killeen, Texas*, the Commission must approve this short-spaced allotment.

Prompt grant of JBL's Petition for Reconsideration would prevent needless waste of resources and public confusion. ASRadio is ready to commence construction of its new station. Currently, ASRadio's construction permit only authorizes it to build its new station on Channel 274A. If the Commission delays a decision in this case, ASRadio will have no choice but to build the facilities authorized in its construction permit, and the licensee of WOLD-FM would have to modify its facilities to operate on Channel 263A.¹¹ This likely would create significant public confusion. If, after all this, the Commission grants the Petition for Reconsideration, ASRadio would have to construct new facilities on Channel 263A, and the licensee of WOLD-FM would have to return to its old channel, creating even more confusion. JBL, of course, would have to reimburse both licensees for these needless expenses. Prompt Commission action can avoid this scenario and the inevitable public confusion that would follow.

If the Commission grants the Petition for Reconsideration, ASRadio also requests that the staff process the necessary implementing construction permit applications as quickly as possible.¹² ASRadio is eager to begin serving Glade Spring, Virginia – whether it is on channel 274A or 263A – and this proceeding already has delayed new service to this community for too long. ASRadio therefore asks that the Commission process this Petition for Reconsideration and

¹¹ ASRadio reserves the right to begin construction if resolution of this proceeding is delayed further.

¹² It is ASRadio's expectation that JBL will pay all FCC filing fees and other reasonable expenses in connection with the filing and the prosecution of an application to change WFYE(FM)'s channel to Channel 263A.

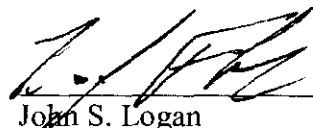
the implementing construction permit applications as quickly as possible. No party will be changing its community of license under the FCC's revised FM allotment procedure. As a result, publication of the filing of the construction permits in the Federal Register will be unnecessary, and the applications can be granted without undue delay.

Based on the foregoing, ASRadio respectfully requests that the Commission grant the Petition for Reconsideration only if it anticipates that it will be able to grant the implementing construction permit applications that will follow such a decision.

Respectfully Submitted,

ASRadio, LLC

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October 9, 2007

CERTIFICATE OF SERVICE

I, Constance A. Randolph of Dow Lohnes PLLC, do hereby certify that I have on this 9th day of October, 2007, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Response" to the following:

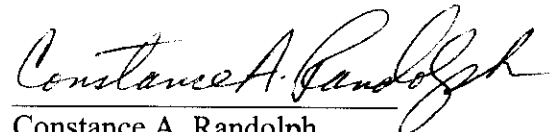
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